JOHN P. TAYLOR, d.b.a. TAYLOR LOGGING
v.
PORTLAND AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 91-13-A Decided July 5, 1991

Appeal from a decision enforcing the terms of a timber contract as written.

Affirmed.

1. Indians: Contracts: Generally--Indians: Timber Resources: Timber Sales Contracts: Generally

Under the terms of the timber contract at issue, the conditions of sale could only be modified in writing and with the approval of the Bureau of Indian Affairs Agency Superintendent.

2. Board of Indian Appeals: Jurisdiction

The Board of Indian Appeals is not a court of general jurisdiction. It has only those powers delegated to it by the Secretary of the Interior. It has not been delegated authority to determine tort claims against the United States.

APPEARANCES: Timothy D. Geiszler, Esq., Missoula, Montana, for appellant; Michael E. Drais, Esq., Office of the Solicitor, Pacific Northwest Region, U.S. Department of the Interior, Portland, Oregon, for the Area Director.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Appellant John P. Taylor, d.b.a. Taylor Logging, seeks review of a September 26, 1990, decision issued by the Portland Assistant Area Director (Program Services), Bureau of Indian Affairs (BIA), for the Portland Area Director (Area Director). The decision enforced a minimum sawlog diameter of 5.6 inches, which was set forth in the Sundown Allotment #2312 Logging Unit, Contract No. P13-C-1420-2024, on the Flathead Indian Reservation (contract). For the reasons discussed below, the Board of Indian Appeals (Board) affirms that decision.

Background

On March 5, 1990, the Superintendent, Flathead Agency, BIA (Superintendent), announced the Sundown Allotment timber sale. The announcement stated that sealed bids would be accepted until 9 a.m., March 22, 1990, and that an oral auction would follow the posting of sealed bids. Appellant was the high bidder for this sale with a bid rate of $128 per thousand board feet for Douglas fir and other species sawlogs and $3 per ton for pulpwood. Section A11 of the contract specified that all logs with a scaling diameter of 5.6 inches and above were considered sawlogs, and defined pulpwood as any timber not meeting sawlog specifications.

Appellant signed the contract on April 6, 1990. The contract was approved by the Superintendent on April 12, 1990. When appellant signed the contract, he informed Tom Orr, the Section Head for the Permits Section of the Tribal Forestry Department, Confederated Salish and Kootenai Tribes, that he intended to sell logs with a diameter of 10 inches or more to Rocky Mountain Log Homes and had discussed hauling the rest of the material from the sale to a tribal post and pole yard.

It appears that appellant logged at least part of the unit and was charged the sawlog rate for all logs with a diameter of 5.6 inches or greater, even though appellant processed all logs of less than a 10-inch diameter as pulpwood. On June 14, 1990, appellant filed a notice of appeal from the Superintendent's decision to charge sawlog rates for logs with diameters between 5.6 and 10 inches. Appellant alleged that BIA had agreed that sawlogs would be 10 inches in diameter; he had signed the contract before all of the spaces were filled in, but with the assurance that the contract would reflect that agreement; and the 5.6-inch diameter sawlog specification was an error. Appellant stated that, as a direct result of this breach of contract, which he further characterized as forming the basis for claims under theories of fraudulent misrepresentation, negligent misrepresentation, fraudulent inducement to contract, and other torts, he incurred an economic loss of approximately $23,422, plus loss of future profits. Appellant also demanded the return of a $3,000 performance bond.

After receiving statements from several persons involved in the timber sale and reviewing appellant's bid and other documents, 1/ the Assistant

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1/ Because the Assistant Area Director considered evidence beyond that contained in the administrative record, he made that information available to the parties and solicited their comments pursuant to 25 CFR 2.21(b), which provides:

"When the official deciding an appeal believes it appropriate to consider documents or information not contained in the record on appeal, the official shall notify all interested parties of the information and they shall be given not less than 10 days to comment on the information before the appeal is decided."

Area Director issued the September 26, 1990, decision at issue here. The Assistant Area Director stated that although it appeared that the appeal was untimely, he would consider the matter on its merits. 2/ He declined to accept appellant's assertions that the 10-inch diameter specification should be read into the contract, and found that appellant' request for payment was both without merit and not authorized and that the performance bond should be retained until all contract provisions were completed and appellant had made all payments for timber harvested from the unit.

The Board received appellant's notice of appeal from this decision on October 29, 1990. Both appellant and the Area Director filed briefs on appeal. On May 30, 1991, the Board received a motion from the Area Director in which he sought the imposition of an appeal bond, or, in the alternative, expedited consideration. The request for expedited consideration is hereby granted.

Discussion and Conclusions

Appellant first argues that "[t]he specific minimum criteria for this bid was determined not at the bid, but later when Tom Orr and appellant negotiated the specific provisions of the contract" (Appellant's Opening Brief at 3). Appellant contends that Orr agreed to modify the contract specifications for minimum sawlog diameter to reflect a 10-inch minimum, failed to make the agreed modifications, and was under a duty to disclose to appellant that BIA would not accept a 10-inch minimum. Appellant cites the Restatement of Torts in support of this argument.

By making this argument, appellant apparently abandons his earlier positions that the contract was not completed when he signed it and that

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fn. 1 (continued)

The Assistant Area Director declined to consider appellant's response, stating that it did not address the information added to the record, but instead constituted an additional brief. On appeal, appellant argues that this decision constitutes reversible error because it denied him his due process right to be heard.

The Assistant Area Director correctly held that 25 CFR 2.21(b) creates a right for parties to comment only on the additional information being considered on appeal. However, even if the Assistant Area Director had been incorrect, appellant incorporated all of the matters presented to the Assistant Area Director into his briefs to the Board. The Board has considered those arguments in rendering this opinion.

2/ As to timeliness, the Assistant Area Director indicated that because the appeal was based on the language of the contract, it appeared that the appeal should have been filed within 30 days from April 6, 1990, when appellant signed the contract; Apr. 12, 1990, when the Superintendent approved the contract; or the date in mid-April 1990, when the signed and approved contract was delivered to appellant.

the 5.6-inch specification was an error. Appellant has instead shifted to arguments based on oral modification of the contract and tort.

[1] The administrative record, including appellant's filings, indicates that when appellant signed the contract, he told Orr about his intentions as to the disposition of the materials to be harvested. Assuming arguendo that Orr told appellant he would modify the contract so that the minimum sawlog specification would be 10 inches rather than 5.6 inches, Orr lacked authority to modify the contract. Section B2.3 of the contract specifies the procedures under which the contract can be modified: "The conditions of sale as set forth in the contract may be modified only through a written agreement between the Seller and the Purchaser prior to the expiration of the contract. No modification shall became effective until approved by the Approving officer." Section A3(a) of the contract, which appears on the first page, clearly states that the Superintendent, not Orr, is the Approving Officer. Any modification to the contract would, accordingly, have to have been in writing and approved by the Superintendent. Appellant does not allege that the Superintendent approved a contract modification.

Furthermore, appellant's actions do not support his present allegations. Appellant contends that the contract was orally modified by Orr at the time it was signed. Appellant, however, who must be deemed to have knowledge of section B2.3 of the contract and who is, by his own statement, an experienced logger, apparently did not examine the contract when he received it and in no other way attempted to verify that the modification he asserts Orr made was incorporated into the written contract and approved by the Superintendent. Since this modification, according to appellant, was a "make-or-break" issue, appellant should have exercised some degree of diligence in pursuing it. Instead, he proceeded under his own prior expectations and arrangements and only brought this appeal when he was faced with the financial consequences of his actions and inactions.

[2] In the alternative and as represented by Orr, if Orr did not agree to modify the contract, appellant's only argument is that Orr's failure to inform him that he was making a financial mistake constituted some form of tort. The Board is not a court of general jurisdiction. It has only those powers delegated to it by the Secretary of the Interior. It has not been delegated authority to consider tort claims against the United states. See, e.g., 43 CFR 4.1; U.S. Fish Corp. v. Eastern Area Director, 20 IBIA 93 (1991), and cases cited therein.

The final argument appellant makes is that the Assistant Area Director erred in reversing the Superintendent's decision to recalculate the amounts owed by appellant using a 7-inch diameter standard. Section A11 of the contract states: "Minimum scaling diameters may vary between 5.6 and 7.0 inches to permit the manufacture of purchaser-preferred lengths." This exception is clear and unambiguous in allowing variance to satisfy log lengths required by the purchaser. Appellant has attempted no showing whatsoever that he falls under this exception.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Portland Assistant Area Director's September 26, 1990, decision is affirmed.

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Kathryn A. Lynn
Chief Administrative Judge

I concur:

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Anita Vogt
Administrative Judge